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REFORMING THE LAW OF GRATUITOUS TRANSFERS: THE NEW UNIFORM PROBATE CODE

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In the mid-1980s the Uniform Law Commission undertook a landmark revision of the American law of gratuitous transfers. These reforms culminated in a drastically revised Uniform Probate Code ("UPC"). The revisions inspired the *Albany Law Review* to organize this symposium issue for the purpose of examining the 1990 UPC. In this introductory paper, we point to the main themes of the reform movement, discuss some of the traits and constraints of the uniform law process, and comment on some of the suggestions and insights that appear in the symposium articles.

I. THE PRE-1990 AND THE 1990 UPC

A little background is in order on the pre-1990 UPC. The Uniform Law Commission¹ promulgated the UPC in 1969. The 1960s had seen considerable controversy about the expense and clumsiness of supervised administration of decedents' estates. Accordingly, the center-

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¹ Shorthand for the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). NCCUSL is composed of commissioners from each state, mostly appointed by the state governors. The expenses of the organization are borne by all the states in proportion to population. NCCUSL publishes an annual handbook, currently titled the *1991-92 Reference Book* (1991), that describes NCCUSL's procedures; identifies the commissioners, the drafting committees, and the officers; and indexes previously promulgated uniform acts on a state-by-state adoption table.

piece of the pre-1990 UPC, and by far its largest portion, was article III, prescribing a model system of probate procedure and estate administration. The main achievement of article III was to provide a system of unsupervised administration (derived from the ancient common-form probate of English practice) for routine estates, back-stopped by an efficient system of supervised administration for genuinely contentious cases. The pre-1990 UPC amplified this procedural system in article IV (regulating ancillary administration) and article V (dealing with guardianship and protective proceedings).² Some fifteen states have adopted the UPC's procedural system.³

Although the pre-1990 UPC was centered on procedure, it dealt with the substantive law of gratuitous transfers in several places, most importantly in articles II and VI.⁴ Pre-1990 article II contained the core provisions of the law of gratuitous transfers: a model law of intestacy, a forced share system of spousal protection derived from Pennsylvania and New York law, and a fairly conventional law of wills. article II also dealt with some of the main constructional doctrines, such as lapse and ademption.

Whereas article II dealt with transfers passing through the probate system, article VI governed nonprobate transfers. Part 1, regulating what the UPC calls multiple-party accounts, unified the rules governing joint bank accounts, Totten trusts, and payable on death ("POD") accounts. A brief part 2 sanctioned the main will substitutes (life insurance, pension plans, trusts, and a variety of others), protecting will substitutes against challenges based upon noncompliance with Wills Act formality.

A. *New Article VI*

Drafting for revisions to article VI commenced in 1986, and the new article VI received final approval from the Uniform Law Commission in 1989. The major initiative in the 1989 redraft was the creation of a new part 3, which the Uniform Law Commission also promulgated as a freestanding act, titled the Uniform Transfer on Death Security Registration Act ("UTODSRA"). UTODSRA facilitates the nonprobate transfer of stocks, bonds, and mutual fund

² Minor tinkering to the 1969 text of articles III-V occurred over the years, as well as major revisions of the guardianship regime.

³ See U.P.C. Table of Jurisdictions Wherein Code Has Been Adopted, 8 U.L.A. 1, 1-4 (Supp. 1992).

⁴ Part 3 of pre-1990 UPC article VII ("Duties and Liabilities of Trustees"), which remains in effect, also addresses substantive law.

shares. Securities previously had been transferable in the nonprobate system only by means of the joint tenancy with right of survivorship. The new article VI made light revisions to the former part 1 of UPC article VI, dealing with multiple-person accounts. These provisions, renumbered as new article VI, part 2, were also made available as a freestanding act.⁵ Finally, old UPC article VI, part 2, the brief section legitimating the will substitutes, was also lightly revised and relocated as new UPC article VI, part 1.

B. *New Article II*

The 1990 revisions to article II were a vastly larger project. After four years of drafting and discussion, the Commission approved a set of fundamental changes in the basic regime of the law of gratuitous transfers—in the intestate distribution scheme, in the rules of spousal protection, in the law of wills, and in the constructional doctrines that are so central to the field. Because there is virtually no intrinsic connection between the substantive law of gratuitous transfers in UPC article II and the procedural system of the UPC (that is, UPC articles III, IV, and V), the Uniform Law Commission also promulgated new article II as a freestanding act for the convenience of jurisdictions that are not part of the UPC's procedural world. The Commission approved this freestanding act, titled the Uniform Act on Intestacy, Wills, and Donative Transfers, in 1991, and the American Bar Association approved it in 1992.

II. THE THEMES OF THE 1990 UPC

The extensive revisions to UPC articles II and VI produced a mass of small improvements, both in wording and in doctrinal detail. These refinements are the needlework of law reform and are more the product of experience than theory. By contrast, the major innovations in the 1990 UPC are strongly driven by changes in legal theory. We think it is useful to identify those changes, and to indicate how they shaped the 1990 UPC. Three grand themes⁶ are at work in the

⁵ The entirety of new article VI is available as the Uniform Nonprobate Transfers on Death Act (1989). The Uniform Law Commission approved new article VI, part 2, for adoption as a freestanding Uniform Multiple-Person Accounts Act (1989). New article VI, part 3, UTODSRA, was also promulgated in 1989. The American Bar Association approved the three freestanding acts in 1990.

⁶ The drafters' perception that they were responding to these trends is spelled out in the "Prefatory Note" at the outset of new UPC article II. UNIF. PROB. CODE ("U.P.C.") art. II, prefatory note (1991).

new UPC: changes in gender relations, curing intent-defeating formalism, and sensitivity to the nonprobate revolution.

A. *Gender Relations*

The profound changes in gender relations and family structure that have occurred over the past quarter century are reflected both in the intestate distribution system of the 1990 UPC and in its forced share regime for protection against spousal disinheritance. The share of the surviving spouse in intestacy is greatly increased. The revised forced share increases the spousal share from one-third of the decedent's augmented estate to one-half of the couple's combined assets. These changes bespeak a policy to implement the partnership theory of marriage, which has the particular consequence of recognizing and protecting the contribution of the homemaker in a conventional support marriage. The 1990 UPC also responds to the increasing prevalence of multiple marriage situations. The UPC distinguishes spousal intestate shares in some multiple marriage cases (section 2-102(3)-(4)); it provides greater clarity about the effect of divorce on probate and nonprobate transfers (section 2-804); and it adopts a forced share system that takes account of material differences in the duration of the marriage (section 2-201).⁷

B. *Intent Over Formality*

The broad decline of formalism across the twentieth century, a movement sometimes associated with the spread of legal realism, has increasingly caused courts and commentators to question certain intent-defeating rules in the law of gratuitous transfers. The 1990 UPC strives in a variety of places to vindicate transferor's intent in circumstances in which the former law might have defeated it. Conspicuous examples include section 2-503 of the 1990 UPC, which allows the court to probate a defectively executed will when the proponent can prove that the defect was harmless; and the intent-serving nonademption rule of section 2-606(a)(6), which was foreshadowed in

⁷ See Lawrence W. Waggoner, *Spousal Rights in our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP., PROB. & TR. J. 683, 715-48 (1992); Lawrence W. Waggoner, *Marital Property Rights in Transition*, 18 PROB. LAW. (forthcoming 1992); Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223 (1990); Lawrence W. Waggoner, *Spousal Probate Rights in a Multiple-Marriage Society*, 45 REC. ASS'N B. CITY N.Y. 339 (1990); John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP., PROB. & TR. J. 303 (1987).

California case law. In the present symposium, Professor Lindgren discusses the new harmless error rule, and Professor Alexander explores the UPC's new law of ademption.

C. Nonprobate Transfers

Articles II and VI have a common agenda in wrestling with the consequences of the nonprobate revolution. Article VI legitimizes the main will substitutes. Article II responds to the spread of nonprobate transfers by undertaking, where possible, to unify the constructional law of probate and nonprobate transfers. A prominent example is section 2-804, which addresses the consequences of divorce, treating a spouse who is subsequently divorced from the transferor as though he or she predeceased the transferor.

It would not quite capture the intent of the 1990 UPC to say that the statute strives to promote nonprobate transfers. Many of us who shared responsibility for the 1990 UPC, indeed perhaps most of us, view the spread of the will substitutes with misgivings. We fear that laypersons too often think that avoiding probate is the equivalent of estate planning. People seldom appreciate how hard it is to keep an estate plan current when there are a dozen or more instruments of transfer executed at different times and in different circumstances. In responding to the spread of the will substitutes, the drafters of the 1990 UPC felt themselves to be following rather than leading. The forces that led to the proliferation of the will substitutes (among them, the pressure from financial intermediaries sponsoring wealth transfer services that compete with probate, and the popular aversion to probate) are deep-seated. The 1990 UPC accepts the inevitability of the will substitutes and attempts to deal with the consequences.

III. CONSTRAINTS AND SAFEGUARDS IN THE UNIFORM LAW PROCESS

Although American lawyers deal with dozens of uniform laws, especially the hugely successful Uniform Commercial Code, not many legal professionals are familiar with the uniform law drafting process. Accordingly, we think it may be instructive to emphasize aspects of uniform law drafting that inform the character of the 1990 UPC.

Articles II and VI of the new UPC originated in recommendations to the Uniform Law Commission from the Joint Editorial Board for the Uniform Probate Code ("JEB"). The JEB is a permanent oversight body for the UPC. It is composed of voting members from each of three sponsoring organizations: the Uniform Law Commission; the

American Bar Association; and the American College of Trust and Estate Counsel. The JEB also has nonvoting members representing organizations of probate judges and law teachers.⁸ The work of revising article VI went immediately to a drafting committee of the Uniform Law Commission, whereas the JEB retained oversight of the redrafting of article II for several years before releasing the project to a Uniform Law Commission drafting committee. Continuity between the JEB and the drafting committees was achieved in various ways. JEB members who were uniform law commissioners were named to the two drafting committees, and the JEB's reporter, Professor Waggoner, continued as the Reporter for the article II drafting committee.

A. *Mixing Practitioners and Academics*

One of the characteristic features of uniform law drafting projects, especially in the field of gratuitous transfers, is the convention that practicing lawyers should oversee the work of academics. For a large project such as the revision of article II, it is usual to have a law professor serve as the reporter. The hope is that the specialist professor will bring depth and academic expertise; but in any event, there is seldom a good alternative to using a law professor, since few practicing lawyers would be able to free up the time needed for a pro bono project that is so large and extends across so many years. But academics left to their own devices can be dangerous, and thus the benign tradition of the Uniform Law Commission that real lawyers should be put in charge of the academics. The American Law Institute follows a similar path in preparing the Restatements: Professors draft, but advisory committees heavy with practicing lawyers and judges monitor the drafts.

The deliberative processes of the Uniform Law Commission ("NCCUSL") provide a further level of safeguard. When a drafting committee's work has reached an advanced state, the draft goes to the full membership of the NCCUSL for floor debate at NCCUSL's annual plenary meeting each August. NCCUSL follows a two-meeting rule for new or heavily revised acts. Thus, both the article VI and the

⁸ The Uniform Law Commission treats the JEB in much the way it does an ordinary drafting committee; the Commission provides the JEB's staff support and schedules its meetings. Officers of the Commission sit with the JEB when convenient.

article II revisions went to floor debate and received approval in two successive years.⁹

B. The Consultative Tradition

Uniform laws are political orphans. They are legal-technical products that seldom attract the support of powerful interest groups. Accordingly, NCCUSL tries to avoid working in areas that are unduly controversial. The tradition is to reach out to groups that are likely to take an interest in a proposed uniform act, and to secure the participation of such groups in an advisory capacity throughout the drafting process. The ideal is to identify relevant interests and to satisfy their concerns to the extent possible in order to have a legislative product that takes account of the real problems and that does not beget needless opposition in the subsequent state-by-state enacting process.

In the field of gratuitous transfers, the participation of the relevant ABA section is invariably sought. Thus, on both the article II and article VI revisions, advisors from the ABA's Section of Real Property, Probate, and Trust Law deliberated with the drafting committees. Because the article VI revisions touched the interests of a variety of financial intermediaries in the banking, mutual fund, and stock transfer industries, extensive efforts were made to notify the industry associations and to secure their participation. In the revision of article II, as it became clear that gender equity was to be a central goal, an advisor from the National Association of Women Lawyers joined the deliberations. Advisors supply another reality check, and they often bring special expertise to the work of the drafting committees.

Uniform acts such as the 1990 UPC are the result of a deliberative process that is measured and lengthy. As proposed legislation goes through the cycle of drafting and redrafting, many hands leave their imprint on the resulting product. The drafting and consultative process is open and outward reaching. If uniform acts suffer from sounding a little stodgy and impersonal in tone, they benefit from the safeguards of widespread involvement and exposure to diverse constituencies in the deliberative process.

⁹ Once again, it is instructive to notice that the other prominent national law reform organization active in the field of gratuitous transfers, the American Law Institute, follows a similar procedure of plenary debate and approval by the full Institute as the final step in the Restatement drafting process.

IV. TINKERING

Perhaps the most disheartening part of the uniform law process is the travail of enacting these orphaned products when they are made available to the states. It takes public-spirited support from the bar in order to evoke interest from the staffs and from the judiciary committee members in state legislatures; there is little popular electoral gain to be had from working to reform a politically arcane area such as the law of gratuitous transfers. But even when helping hands materialize and the proposed uniform acts come under deliberation in state bar association committees and in committees of the state legislature, there is sometimes a disposition to tinker in ways that are ill considered.

Local variations cause the uniform laws to lose the uniformity that is a great part of their value. The case for uniformity is strongest in fields such as commercial law, in which multi-state contacts are so intense. It is sometimes thought witty to contrast the field of probate and gratuitous transfers, on the ground that a decedent can only die in one place. But that decedent can own property in many jurisdictions, and because it is ever more common for people to change domicile later in life, an estate plan that is crafted in one state may come into effect in another.

Much of the tinkering that goes on when states vary uniform acts is of a sort that would not occur if due consideration were given to what might be called the process values of the system that produces uniform laws. On almost any issue, there will be a multitude of possibilities for organizing and expressing a legislative solution, and some will be close substitutes. In the course of multi-year drafting projects such as those that produced the new UPC, a vast number of alternatives are considered and revised or rejected en route to the final product. In short, it is quite likely that someone's bright idea is not as bright as it seems—that there are reasons why the uniform law draft did not go down the different path that occurs to someone who examines the final product afresh.

Our experience is that most variations that are introduced into uniform laws at the local level are proposals that were considered and rejected for good cause in the uniform law drafting process. In view of the extensiveness of the deliberations and the multiple levels of expertise that are brought to bear on uniform acts, the possibility that some fundamental flaw infects a uniform act is in any particular case not very likely. All too often, local variations are the result of less well informed persons acting on scant investigation to reinvent

wheels that the relevant uniform law drafting committee cast away after careful deliberation. Accordingly, we think that states would be wise to indulge in a moderate presumption that uniform laws are well enough conceived that local variations should be discouraged. We also urge bar committees and legislative personnel who are considering uniform laws for adoption in the states to contact the relevant Uniform Law Commission personnel to learn the reasons why a drafting committee took the path that was ultimately chosen.

We do not mean to say that proposed uniform laws are always perfect. There is indeed the possibility that despite all the safeguards and all the deliberations, a uniform act overlooks some manifestly superior alternative. A good lawyer can always "get on the other side" of any question of statutory design, on issues ranging from grand principle to minute detail to matters of wording. We urge, however, that those welcome moves should be made during the course of the long and open deliberative process leading to promulgation of a uniform act, rather than in the state enactment process. The simple truth is that the state enacting process seldom achieves the depth of review that characterizes the uniform law drafting process.

We would not wish to be taken in these remarks as wishing in any sense to foreclose debate about the principles or the statutory design of uniform acts, especially when uniform laws work such large scale reforms as those of the 1990 UPC. These omnibus acts are compromise documents, and they embody defeats as well as victories for everyone who was active in the drafting process. Time will reveal that the 1990 UPC had its share of oversights and mistakes. The present symposium issue of the *Albany Law Review* would not be needed if only celebration were in order. It is precisely because the UPC in its entirety is such a large and complex work that it has required and will continue to require revision. The JEB remains in business and is actively considering the next round of projected legislation—which, at the moment, includes revisions in the virtual representation and disclaimer rules. The JEB welcomes constructive criticism of the UPC and expects to respond to criticism and experience by undertaking future cycles of revision. In asking that local variations be resisted, we are speaking to a process value. We believe that the careful, open deliberative process of the uniform laws revision cycle is a better way to deal with changes in the field and perceived defects in the acts than is local variation.

V. THE SYMPOSIUM PAPERS

The symposium papers cover a large portion of the article II revisions and one paper speaks to new article VI. In reacting to various of the suggestions presented in the symposium articles, we shall be making a few clarifying points where appropriate and stating our personal viewpoint on a few issues concerning the papers on article II.¹⁰ Of course, we do not speak on behalf of the JEB.

A. *Intestacy—Article II, Part 1*

Professor Fried's article perceptively canvasses the 1990 intestacy provisions.¹¹ In the course of discussion, he contrasts the intestate share of the surviving spouse with the spouse's elective share. The intestate share is more generous because it is designed to mirror donative intentions in a solid marriage. For this purpose, the length of the marriage is quite irrelevant. The elective share, by contrast, is mainly designed for failed marriages in which the titled decedent has exhibited an intention to deprive the surviving spouse of what should have been the spouse's own partnership share of the marital estate. The elective-share system uses a graduated rate schedule related to the length of the marriage as a proxy by which to segregate marital from separate property and to grant the surviving spouse an equal share of the marital-property portion.

¹⁰ We did note one point in the paper dealing with multi-person accounts, William M. McGovern, Jr., *Nonprobate Transfers Under the Revised Uniform Probate Code*, 55 ALB. L. REV. 1329 (1992), upon which we wish to comment. Professor McGovern raises a question about the effect of a pre-marital joint account on the elective share. *See id.* at 1346. The hypothetical he gives is that Mary sets up a joint account with her children and later marries. The hypothetical assumes that Mary's children made no contributions to the account. There is no ambiguity about whether the full value of the account is included in the augmented estate. It is included. Under § 6-211(b), Mary is the owner of the full balance of the account during her lifetime. Consequently, the value of the full balance would be included in the augmented estate under § 2-202(b)(2)(i) or (ii). The fact that it would not be included under § 2-202(b)(iv) because it was not a transfer that took place during marriage is irrelevant.

We wish it to be understood that the subparagraphs and sub-subparagraphs of § 2-202(b) are not mutually exclusive. More than one can cover a transaction, as § 2-202(d) makes clear by providing that if the terms of more than one of them apply, the property is included under the one that yields the highest value. For example, suppose that the decedent, during marriage, establishes a revocable inter vivos trust that pays the income to the decedent for life, remainder in corpus to the decedent's brothers and sisters. The value of this trust would be included in the augmented estate under § 2-202(b)(i), (b)(iv)(A), or (b)(iv)(B).

¹¹ Martin L. Fried, *The Uniform Probate Code: Intestate Succession and Related Matters*, 55 ALB. L. REV. 927 (1992).

B. Elective Share—Article II, Part 2

Writing about the redesigned elective share, Professor Bloom focuses on the difficulty of accurately valuing income and other partial interests held by the surviving spouse at the decedent's death.¹² If the surviving spouse is the income beneficiary of a QTIP trust created by the decedent or a former spouse, Bloom worries about undercompensating the surviving spouse if the income interest is persistently overvalued. Were an overvaluation to occur, we wish to point out that the surviving spouse's undercompensation would be much greater for QTIP's created by the decedent's will than for QTIP's created by a former spouse. If the QTIP is created by the decedent's will, the charging rule causes the surviving spouse to be undercompensated in the exact amount of the overvaluation. This is because the overvaluation does not increase the value of the augmented estate¹³ (hence the overvaluation does not increase the elective-share amount) and because the full value of the surviving spouse's income interest counts toward satisfying the elective-share amount.¹⁴ If the QTIP is created by a former spouse,¹⁵ however, the

¹² Ira M. Bloom, *The Treatment of Trust and Other Partial Interests of the Surviving Spouse under the Redesignated Elective-Share System: Some Concerns and Suggestions*, 55 ALB. L. REV. 941 (1992). We note in passing Professor Bloom's citation of Rena C. Sepowitz, *Transfers Prior to Marriage and the Uniform Probate Code's Redesignated Elective Share: Why the Partnership is Not Yet Complete*, 26 IND. L. REV. 1 (1991), an article that suffers some flaws. Sepowitz incorrectly states that revocable trusts created by the decedent prior to the marriage are not included in the augmented estate. In fact, such trusts are included under 1990 UPC § 2-202(b)(2)(i) because the decedent's retained power to revoke is a presently exercisable general power of appointment as defined in § 2-202(a)(iii). See RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 11.1 cmt. c & illus. 5 (1984); *Sullivan v. Burkin*, 460 N.E.2d 572 (Mass. 1984). We also disagree with Sepowitz's proposition that the absence of a specific provision bringing irrevocable transfers prior to the marriage into the augmented estate necessarily precludes a court from subjecting such transfers to the elective share. In a particularly egregious case (for example, if the decedent on the eve of the marriage irrevocably transferred a large amount of money or other assets to someone other than the prospective spouse), we would expect a court to exercise its residual equitable power to subject those transfers to the elective share. See for example, *Carr v. Carr*, 576 A.2d 872 (N.J. 1990), for a case in which the court invoked equitable principles to cover a situation not specifically covered in the elective-share statute.

¹³ Under 1990 UPC § 2-202(b)(1), the value of the corpus of the QTIP trust, which stays constant regardless of the value of the income interest, is included in the augmented estate as part of the decedent's net probate estate.

¹⁴ The income interest is covered by 1990 UPC § 2-207(a)(1) because it passes to the surviving spouse by testate succession.

We note, however, that an overvaluation of the spouse's income interest might not cause the spouse to lose money. There can be cases in which the surviving spouse would have no claim to any of the decedent's assets even if the income interest were "correctly" valued. For example, suppose that the "correct" value of the spouse's income interest is \$100,000 but the value at-

surviving spouse's potential undercompensation proves to be only a fraction of the amount of the overvaluation. This is because the overvaluation increases the augmented estate dollar for dollar,¹⁶ which increases the spouse's elective-share amount by the elective-share percentage of the overvaluation;¹⁷ and because, in marriages of less than fifteen years, the overvaluation only partially counts under the charging rule.¹⁸

tributed to it is \$120,000. The value of the augmented estate is the sum of the values of the decedent's net probate estate (\$200,000) and the surviving spouse's own assets (\$100,000). Because the length of the marriage was over 15 years, the elective-share percentage is 50%. The elective-share amount is \$150,000 (50% of \$300,000), but because the full value of the spouse's assets (\$100,000) and the income interest in the QTIP trust (\$120,000) count first toward satisfying the elective-share amount, *see* U.P.C. § 2-207(a)(1), (a)(4) (1991), the surviving spouse has no claim to any of the decedent's assets.

In the end, the "correct" valuation of the spouse's income interest would have led to the same result. The amount that should have counted toward satisfying the elective-share amount is \$200,000, not \$220,000. Because the "correct" amount also exceeds the elective-share amount, the spouse would have had no claim to any of the decedent's assets under a "correct" valuation.

¹⁶ Note that a QTIP trust created in an irrevocable inter vivos trust by the decedent more than two years prior to death is treated in the same manner as a QTIP trust created by a former spouse.

¹⁶ Under 1990 UPC § 2-202(b)(4), the value of the income interest is included in the augmented estate as an asset owned by the surviving spouse at the decedent's death.

¹⁷ For example, suppose that the "correct" value of the spouse's income interest in a QTIP trust created by a former spouse is \$100,000 but the value attributed to it is \$120,000. The income interest is overvalued by \$20,000. The augmented estate is composed of the sum of the values of the decedent's net probate estate of \$400,000 and the surviving spouse's income interest. The value incorrectly attributed to the augmented estate is \$520,000 (\$400,000 + \$120,000).

In a fifteen-or-more-year marriage, where the elective-share percentage is 50% (the type of marriage used by Professor Bloom in his examples), the elective-share amount is \$260,000 (50% of \$520,000). Because the full value of the spouse's income interest (\$120,000) counts toward satisfying the elective-share amount, *see* U.P.C. § 2-207(a)(4) (1991), the surviving spouse has a claim to \$140,000 of the decedent's assets. If the spouse's income interest had been correctly valued, the augmented-estate value would have been \$500,000 (\$400,000 + \$100,000) and the elective-share amount would have been \$250,000 (50% of \$500,000). Because the full value of the spouse's income interest (\$100,000) counts toward satisfying the elective-share amount, the surviving spouse would have had a claim to \$150,000 of the decedent's assets under a "correct" valuation, rather than the \$140,000 claim. The \$20,000 overvaluation only causes the spouse to lose \$10,000 (50% of \$20,000).

¹⁸ In a marriage of less than fifteen years, the elective-share percentage is less than 50%; the portion that counts toward satisfying the elective-share amount under 1990 UPC § 2-207(a)(4) is twice the elective-share percentage of the value of the income interest. Suppose that the length of the marriage in the example in note 17, *supra*, was over ten but less than eleven years, the elective-share percentage would be 30%. The elective-share amount would be \$156,000 (30% of \$520,000). Because only 60% of the value of the spouse's income interest (\$72,000 [60% of \$120,000]) counts toward satisfying the elective-share amount, *see* U.P.C. § 2-207(a)(4) (1991), the surviving spouse has a claim to \$84,000 of the decedent's assets. If the spouse's income interest had been correctly valued, the elective-share amount would have been \$150,000 (30% of \$500,000). Because 60% of the value of the spouse's income interest (\$60,000 [60% of \$100,000]) counts toward satisfying the elective-share amount, the surviving spouse would have

We see the prospect of persistent overvaluation as minimal. Professor Bloom builds the case for persistent overvaluation on the assumption that income interests will be automatically valued under the actuarial tables issued by the U.S. Treasury Department for estate and gift tax purposes. As participants in drafting the 1990 UPC, we wish it to be understood that reference to the Treasury tables was deliberately omitted from both the statutory language and the comments.¹⁹ Nothing in the UPC grants the tables mandatory or presumptive status. In a valuation dispute, we would expect the party who would benefit from the tables to argue for their use. We would also expect the party who would be disadvantaged by the tables—presumably the surviving spouse—to resist their use, by citing many of the arguments put forward by Professor Bloom.²⁰ In the end, valuation of income and other partial interests will be resolved by negotiation and agreement or by the trier of fact on the basis of the evidence. There is no reason to expect surviving spouses to be the persistent victim of inaccurate valuation. Valuation issues are endemic to any elective-share system and are not restricted to income and other partial interests. They can arise with regard to partnership interests, closely held corporate stock, land, and jewelry, to give just a few examples. Nearly all of them will be resolved at the pretrial or trial stage and not be the subject of appellate argument.

had a claim to \$90,000 of the decedent's assets under a "correct" valuation, rather than the \$84,000 claim. The \$20,000 overvaluation only causes the spouse to lose \$6,000 (30% of \$20,000).

We note, however, that an overvaluation of the spouse's income interest might not cause the spouse to lose money. There can be cases in which the surviving spouse would have no claim to any of the decedent's assets even if the spouse's income interest were "correctly" valued. For example, suppose (as in the above example) that the "correct" value of the spouse's income interest is \$100,000 but the value attributed to it is \$120,000. The augmented estate is composed of the sum of the values of the decedent's net probate estate of \$100,000 and the surviving spouse's income interest in a QTIP trust created by a former spouse. If the length of the marriage was over seven but less than eight years, the elective-share percentage is 21%. The value incorrectly attributed to the augmented estate is \$220,000 (\$100,000 + \$120,000) and the elective-share amount is \$46,200 (21% of \$220,000), but because 42% of the value of the spouse's income interest (\$50,400 [42% of \$120,000]) counts toward satisfying the elective-share amount, *see* U.P.C. § 2-207(a)(4) (1991), the surviving spouse has no claim to any of the decedent's assets. In the end, the "correct" valuation of the spouse's income interest would have led to the same result. The "correct" augmented-estate value should have been \$200,000 (\$100,000 + \$100,000) and the elective-share amount should have been \$42,000 (21% of \$200,000), but because 42% of the value of the spouse's income interest (\$42,000) counts toward satisfying the elective-share amount, the surviving spouse would have had no claim to any of the decedent's assets under a "correct" valuation.

¹⁹ The fact that we once used the Treasury tables as a convenient source for valuing an annuity in a law review article, a fact cited by Professor Bloom, is quite irrelevant.

²⁰ Bloom, *supra* note 12 at 959-68.

We are therefore not inclined to support the idea of excluding from the augmented estate QTIP property from another marriage, all trust interests created by third parties, or all partial interests of either spouse in property outside of trust.²¹ We believe that making any of these exclusions would improperly create incentives to pour property into excluded forms of ownership and unfairly disadvantage those who unknowingly put assets into included forms of ownership.

Largely for the reasons given by Professor Bloom,²² but also because overvaluation of QTIP income interests created by the will of the decedent have more serious consequences than overvaluation of QTIP income interests created by a former spouse,²³ we are more sympathetic to the suggestion that the charging rule be amended so that the spouse can disclaim an income or other partial interest created by the decedent without having the value of the disclaimed interest count toward satisfying the elective-share amount.

Professor Turano also writes on the elective share.²⁴ To put the elective share into perspective, she traces the history of women's inheritance and property rights, compares the equitable distribution in divorce law with the elective share, and places the elective share against the backdrop of feminist scholarship. She gives the new UPC elective-share system a favorable evaluation, but makes one suggestion for change: To address the situation of the spouse who reduced his or her own earning capacity to stay home with children while the other spouse continued to work and advance his or her career, she suggests that the statute be amended to provide such a spouse a larger elective share, perhaps 75 percent, or an increased supplemental elective share, perhaps \$200,000. The objective would be to recompense a surviving spouse for sacrificing career-advancing work experience. This is a thoughtful suggestion that deserves serious consideration in the next round of deliberation on the elective share. If extra compensation were to be awarded, however, we think it would be appropriate only for a surviving spouse who both stayed home with children while the other worked in the labor market and is young enough still to be a potential wage earner. If the extra compen-

²¹ Professor Bloom states that "in existing marriages it will not be possible [for the parties] to negotiate out of the [elective-share] system by premarital agreement." Bloom, *supra* note 12 at 980. We observe, however, that 1990 UPC § 2-204(a) provides that "the right of election . . . may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse." (emphasis added).

²² Bloom, *supra* note 12 at 975-76.

²³ See *supra* notes 12-18 and accompanying text.

²⁴ Margaret Valentine Turano, *UPC Section 2-201: Equal Treatment of Spouses?*, 55 ALB. L. REV. 983 (1992).

sation should not be available to retirement-age surviving spouses (on the theory that they are no longer disadvantaged by their foregone work skills), we would think that the extra compensation should be reduced for pre-retirement-age surviving spouses by some formula that accounts for the time left to retirement age. Constructing an appropriate phase-in/phase-out formula could prove to be difficult and controversial, and appending it to an already intricate statutory scheme could prove complicated.

C. *Will Execution, Revocation, and Revival—Article II, Part 5*

In a visionary article, Professor Lindgren writes on the formalities for executing a valid will, including the dispensing power provision.²⁵ He argues, as he has before,²⁶ for abolishing the witnesses-attestation requirement. Recognizing that witnesses-attestation is desirable, he advances some clever ideas for encouraging but not requiring it.²⁷

Professor Whitman writes on the revocation and revival provisions of the 1990 UPC.²⁸ Placing the 1990 provisions in the context of the history of revocation and revival, he finds the new provisions more intent-effecting than any other. Especially noteworthy is his discussion of *In re Estate of Boysen*.²⁹ As the first and we believe only appellate case to interpret the liberal revival statute of the pre-1990 UPC, *Boysen* is very disturbing. One can appreciate the court's dilemma. After learning that his 1964 will had been lost,³⁰ Chris Boysen, an elderly testator, executed a new will in 1975 in which he attempted to replicate the earlier will from memory; the 1975 will expressly revoked all former wills. Later, upon being told that the 1964 will had been found, Chris tore up the 1975 will. He told his son to keep the pieces because "they may have lost [the 1964 will] yet [and the pieces of the 1975 will] will give us . . . some sort of an idea of my likes."³¹ In this conversation, Chris rather clearly indicated an

²⁵ James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009 (1992).

²⁶ See James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C.L. REV. 541 (1990).

²⁷ See Lindgren, *supra* note 25 at 1026-27.

²⁸ Robert Whitman, *Revocation and Revival: An Analysis of the 1990 Revision of the Uniform Probate Code and Suggestions for the Future*, 55 ALB. L. REV. 1035 (1992).

²⁹ 309 N.W.2d 45 (Minn. 1981).

³⁰ The will had been filed with the Dodge County clerk of court. In 1972 the court removed the will from the courthouse vault in order to review it in connection with a proceeding for the dissolution of the marriage of Chris's son, Raymond. A few years later, it was learned that the will had never been returned to the court clerk's custody, and attempts to locate the will proved unsuccessful.

³¹ *In re Estate of Boysen*, 309 N.W.2d at 46.

intent to revive his 1964 will³² and his belief that the terms of the 1964 will were pretty similar to those of his 1975 will. In fact, the terms of the two wills were vastly different. Although both wills favored his son Raymond over his daughter Genevieve, the 1975 will in effect gave Genevieve one-fourth of his farm (worth about \$150,000) whereas the 1964 will only gave her \$7,000. What should the court do, given that the revival statute says that a will is revived if the proponent proves that it was "evident from the circumstances of the revocation of the [1975] will or from testator's contemporary or subsequent declarations that he intended the [1964] will to take effect as executed"?³³ The court obviously sensed that there would be a great injustice if the 1964 will were held revived. The court's solution was to put a judicial gloss on the statute by imposing three discrete tests. The court said that the 1964 will could only be revived if the trial court, on remand, affirmatively found that the testator, at the time he revoked the later will, (1) knew whether the earlier will was in existence, (2) knew the nature and extent of his property and the disposition of his property made by the earlier will, particularly with respect to persons with a natural claim on his bounty, and (3) disclosed an intent to make the disposition that the earlier will directed. Upon remand, these three tests achieved the court's purpose. Raymond, the proponent of the 1964 will, was not able to carry the burden of proof on all three tests and the 1964 will was not revived.

We agree that the 1964 will should not have been revived, but regret that the three discrete tests now unfortunately apply to all revival cases in Minnesota and, worse yet, risk being exported to other UPC states. Translating a general statutory prescription into discrete sub-requirements is inappropriate because it makes it more difficult for a proponent to prevail than the legislature and the framers of the UPC intended. In a more normal revival case, where the testator knows the terms of the will he or she wants to revive, the proponent should only have to prove what the statute requires.

We suggest a way that would have allowed the Minnesota court to deny revival of the 1964 will without adversely affecting other revival cases. This is to concentrate on the statutory phrase "as executed." UPC section 2-509 requires the testator to manifest an intent that the first will take effect *as executed*. Without knowing the contents of the first will, the phrase "as executed" probably precludes revival.

³² The court seems clearly off base in concluding that Chris made no declarations indicating an intent to revive.

³³ Minn. Stat. Ann. § 524.2-509(a) (West 1975). This is the language of the pre-1990 UPC § 2-509(a).

We think the proper interpretation of the UPC requires that the testator have an informed intent to revive, not merely an intent to revive. If the proponent establishes an intent to revive, we would presume that the testator's intent to revive was informed and place the burden of proof on the other party to establish that the intent to revive was uninformed. In *Boysen*, Genevieve could easily have carried that burden and the result would have been the same—the 1964 will would not have been revived.³⁴

The 1990 version of section 2-509 carries forward the general language of the pre-1990 version, but the comment explicitly disapproves of the *Boysen* sub-tests approach. Hopefully, courts in future cases will interpret section 2-509 in accordance with its intent-effecting purpose.

Professor Alexander writes about ademption by extinction.³⁵ In setting the stage for an analysis of the 1990 UPC provisions, he shows how the generally followed "identity" theory of ademption can be intent-defeating, canvasses various escape routes courts sometimes take to avoid intent-defeating results (such as classifying a devise as general rather than specific or applying the mere-change-in-form principle), and discusses the pre-1990 UPC ademption rules. The basic story in ademption, as it is in so many other areas of the law of gratuitous transfers, is that the 1990 UPC provisions carry forward trends already in motion toward making the law of wills less formalistic and more intent-effecting. Professor Alexander also considers possible objections to the new UPC provisions and, in an analysis with which we fully agree, finds them without merit. In the end, Professor Alexander concludes that the 1990 UPC ademption rules "will avoid some of wills law's more embarrassing results."³⁶

³⁴ Simply leaving the case in this posture, however, as the court did in the end, does not do justice either. The result of refusing to revive the 1964 will was that Chris died intestate, giving a 50/50 split between Raymond and Genevieve, despite the fact that both of Chris's wills favored Raymond. The just result in the case would have been to give effect to the revoked 1975 will under the theory of dependent relative revocation ("DRR"). The court could easily have held that Chris revoked his 1975 will on the mistaken belief that the 1964 will contained similar provisions. Applying DRR, the 1975 will would be found not revoked. This is the only case we have seen in which DRR would carry out the testator's actual intention. In *Boysen* itself, the court invoked procedural reasons and refused even to listen to a DRR argument.

³⁵ Gregory S. Alexander, *Ademption and the Domain of Formality in Wills Law*, 55 ALB. L. REV. 1067 (1992).

³⁶ Alexander, *supra* note 35, at 1089.

D. Rules of Construction—for Wills, Article II, Part 6; for Wills and Other Nonprobate Transfers, Article II, Part 7

As participants in the drafting of the 1990 revisions, Professors Halbach and Waggoner write on the 1990 UPC provisions on survivorship and antilapse.³⁷ They undertake to explain the rationale and application of these provisions in more detail than the official comments to these sections could provide.³⁸

Professor Kurtz examines the effect of the 1990 UPC on powers of appointment.³⁹ Two rules of construction in revised article II apply exclusively to powers of appointment—sections 2-608 and 2-704. Section 2-608 is a rule of construction that concerns whether a general residuary clause in a will presumptively exercises a power of appointment. Section 2-704 is a rule of construction, applicable to wills and other governing instruments, that concerns the interpretation of specific-reference requirements.⁴⁰ Professor Kurtz also analyzes other features of the UPC that bear on powers of appointment and makes some suggestions for improvement to which the JEB needs to attend.

³⁷ Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091 (1992).

³⁸ Toward the end of his article, Professor Averill takes issue with some of the features of the antilapse statute. See Lawrence W. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 919 (1992). We disagree with Professor Averill's analysis, and believe that he makes the error of linking client intention with lawyer's language that does not put the client on notice regarding the lawyer's understanding (or, in this case, misunderstanding) of the supposedly clear import of the language. For the view that we support, see Halbach & Waggoner, *supra* note 37, at 1102-08.

We also note that Averill suggests that the UPC provision exposes drafting attorneys to malpractice claims. In footnote 144, Averill cites Martin D. Begleiter, *Article II of the Uniform Probate Code and the Malpractice Revolution*, 59 TENN. L. REV. 101, 126-30 (1990), as giving a thorough discussion of the malpractice question. Professor Averill's and Begleiter's concerns, however, are quite unfounded, as explained in Halbach & Waggoner, *supra* note 37, at 1108 n.62.

Averill suggests that the scope of relatives that the 1990 UPC antilapse provision protects, which was basically carried over from the pre-1990 version, may be too broad. The 1990 UPC antilapse provision covers devisees who are stepchildren or grandparents or descendants of grandparents. Averill's suggestion is that the rationale of the antilapse statute—preventing a descending line from being cut off by a premature death—is stronger for direct descendants of the testator than for ancestors and their descendants. This is a point well taken, but we believe that the change, if there is to be one, would be to limit the scope of the statute rather than to treat survival language one way for direct descendants and another way for ancestors and their descendants.

³⁹ Sheldon F. Kurtz, *Powers of Appointment Under the 1990 Uniform Probate Code: What was Done—What Remains to be Done*, 55 ALB. L. REV. 1151 (1992).

⁴⁰ A specific-reference requirement arises when a will or other governing instrument that creates a power of appointment expressly requires that the power be exercised by a reference, an express reference, or a specific reference, to the power or its source.

Professor Kurtz finds that the 1990 revisions did a commendable job of rethinking rules of construction bearing on powers and suggests that a comprehensive treatment of powers law would be welcome some time in the future. Although these additional issues, such as creditors' rights, are beyond the scope of article II, a separate article on powers or a freestanding uniform powers of appointment act might be considered.

Drawing on his vast knowledge, Professor Fratcher places various provisions on class gifts to heirs, issue, and like groups into context of ancient law and modern trends.⁴¹

E. General Provisions Concerning Probate and Nonprobate Transfers— Article II, Part 8

Professor Medlin writes on the disclaimer provision and suggests pathways for future reform.⁴² As the comment to section 2-804 indicates, only minor amendments were made to this provision in the 1990 revisions. The JEB will be recommending more significant revisions to this section and the freestanding disclaimer acts in the near future.

F. Multijurisdictional Implications

Professor Schoenblum writes on the multijurisdictional aspects of article II.⁴³ He concentrates mainly on sections of article II that were carried forward from the pre-1990 UPC without revision. He is correct in pointing out that the 1990 revisions did not address multijurisdictional problems.

It seems likely to us that the criticism voiced by Professor Schoenblum will resonate, and that future rounds of reform in the law of gratuitous transfers will need to pay more attention to problems of international and multistate estate planning. We regret that Professor Schoenblum did not link his criticisms with, in his words, "a comprehensive blueprint for addressing multijurisdictional issues."⁴⁴ The time seems ripe for a comprehensive and specific set of proposals.

⁴¹ William F. Fratcher, *Class Gifts to "Heirs," "Issue," and Like Groups*, 55 ALB. L. REV. 1205 (1992).

⁴² S. Alan Medlin, *An Examination of Disclaimers Under UPC Section 2-801*, 55 ALB. L. REV. 1233 (1992).

⁴³ Jeffrey A. Schoenblum, *Multijurisdictional Estates and article II of the Uniform Probate Code*, 55 ALB. L. REV. 1291 (1992).

⁴⁴ Schoenblum, *supra* note 43, at 1327.

G. Overview

Because we were so deeply involved in the drafting and deliberative process that led to the new UPC article II, we are not the best candidates to pass judgment on our own handiwork. The *Albany Law Review* symposium has been an instructive occasion for us, because it has exposed the article II reforms to the critical attention of so many able scholars.

We are particularly impressed and gratified that there is no serious disagreement in these many scholarly articles with the grand themes of the new UPC article II. It is hard to find a trace of dissent in the symposium papers concerning the major policy premises of the legislation—unifying the law of probate and nonprobate transfers, overcoming intent-defeating formalities, and achieving greater equity in spousal property relations. Our symposium authors do, however, remind us that in translating large policy concepts into highly specific legislative prescriptions, a host of detailed choices arise, and these choices entail important practical consequences. Many of these choices are close substitutes; there are often good arguments for each. We have tried in this paper, as in the drafting of UPC article II itself, to explain the choices that were made, while conceding that complete consensus on matters of statutory detail cannot be achieved. We take away from this valuable symposium a deep sense of satisfaction that the new UPC article II has attracted so much support from a group of specialist authors whose job is to be critical and probing. We reiterate that the task of revision is never ending, and that as experience shows the need for reforming the reforms, scholars and practitioners will find a warm welcome when they bring needed repairs to the attention of the JEB.